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In the Supreme Court of the United States

No. 68.

OCTOBER TERM, 1944.

CITY OF CLEVELAND,
a Municipal Corporation in Ohio,
Appellant,

vs.

THE UNITED STATES OF AMERICA
and
FEDERAL PUBLIC HOUSING AUTHORITY.

BRIEF OF APPELLANT, THE CITY OF CLEVELAND.

THOMAS A. BURKE, JR.,
Director of Law,
JOSEPH F. SMITH,
Assistant Director of Law,
of Counsel,
204 City Hall,
Cleveland, Ohio,
Attorneys for Appellant,
City of Cleveland.

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STATEMENT OF THE CASE.

This appeal arises out of an action filed by the United States of America and the Federal Public Housing Authority against the County Treasurer of Cuyahoga County, the County Auditor of Cuyahoga County, the Board of County Commissioners of Cuyahoga County and the City of Cleveland, Ohio, in the United States District Court for the Northern District of Ohio. Contemporaneous with the filing of the complaint the District Attorney made a request on the trial court for a three Judge court pursuant to the provisions of Section 266 of the Judicial Code. The complaint alleges that jurisdiction is based on the fact that the United States of America was the plaintiff; that the matter in controversy arises under the constitution and laws of the state of Ohio and involves more than $3,000. It alleged that John J. Boyle, the County Treasurer of Cuyahoga County, was actively asserting that taxes on certain government housing projects in the City of Cleve-

land are a proper and lawful lien on the property of the government; that unless enjoined he would continue to attempt to enforce collection of the tax liens and sell the property pursuant to Section 5703 of the Ohio General Code; that the laws of the State of Ohio relating to the taxation of real property, in particular Sections 5328 and 5625-3 of the General Code of Ohio contravene the Constitution of the United States. The plaintiffs prayed for a temporary injunction against the County Treasurer from collecting or taking action to collect said taxes; against the Board of County Commissioners of Cuyahoga County, the auditor of the county and the City of Cleveland for assessing, levying or attempting to levy taxes against the property so long as it continued to be owned by the Federal Public Housing Authority or the United States; that the taxes heretofore levied be declared void and upon final hearing the temporary injunction be made permanent. The case was advanced for immediate trial and no hearing had on the motion for a temporary order.

The housing projects concerned in this action were all projects that were built under the National Recovery Act and were not projects that were in any way concerned with war housing or the war effort. The land on which the projects is located was acquired by the United States government under its power of eminent domain by appropriation from the former private owners thereon.

Prior to January 1, 1940 the projects were administered by the Federal Public Housing Authority but since that date they have been leased to the Cleveland Metropolitan Housing Authority, a public housing agency created under the laws of Ohio. The Cleveland Metropolitan Housing Authority, as did the federal authority when under its control, leases out to individuals, or families, the various residential units that are included in these projects. These facts, together with others, are in the case either as found in the complaint or the stipulation as to facts upon

which this case was tried. No other testimony was taken.

This appeal comes to the United States Supreme Court by a direct appeal from the judgment of the Special District Court of three Judges convened under authority of Section 266 of the Judicial Code. Upon trial a divided court made a finding in favor of the plaintiffs to the effect that the property since the date of its acquisition by the United States has been immune from any form of taxation or special assessment and in the absence of Congressional consent said property cannot be subject to any form of state taxation or special assessment as long as it continues to be owned by the United States of America or the Federal Public Housing Authority; that the taxes and assessments appearing of record against this property since its acquisition are null and void; that the defendants, its successors and assigns are hereby enjoined to take any action to enforce the tax liens; that they be ordered to cancel them of record and remove the land from the tax rolls.

JURISDICTION OF THE THREE JUDGE COURT.

No question of the jurisdiction of the three Judge Court was raised by this appellant but upon the case being filed in the Supreme Court of the United States the judges of that court suggested the question of its jurisdiction and counsel was requested to discuss in its briefs and in oral argument the question as to whether Section 266 of the Judicial Code is properly applicable to these cases so as to give this Court jurisdiction of the appeal.

A three Judge Court under the authority of Section 266 of the Judicial Code was requested by the plaintiff at the time of the filing of the petition. No hearing was held with reference to plaintiff's request for a three Judge Court and when defendants appeared for trial the three Judges were on hand to hear the case. We did not object as it was our opinion that the court would have jurisdiction by reason of the county treasurer being involved, whose

office performs many state duties in spite of the fact that he is elected within the county. All general taxes coming to the City of Cleveland and all special assessments levied or special improvements are collected by the county treasurer and it was our opinion that we would have to go along with the three Judge Court since we had been joined as defendant with our tax collection agency which we looked upon as being clothed with state powers.

At the outset we must concede that the City of Cleveland is not a state officer; we must concede that it does not levy taxes for the State of Ohio; that if we had been the sole defendants in this case we would undoubtedly come within the case of *Ex Parte National Bank* (278 U. S. 101) which has been called to our attention by this Court. We say however that our right to be here under the jurisdiction of this Court must depend upon whether this Court has jurisdiction of the county defendants that were originally named in this action. If any of the county defendants in the trial court have a right of appeal direct to this Court; we do not believe that it could reasonably be held that any appeal from the decision of the trial court by the defendant City of Cleveland must be by way of the United States District Court of Appeals while the other defendants make their appeal direct to the Supreme Court.

There might be some logic in the proposition that the City of Cleveland was improperly joined in the first place. Since we are vitally interested in the tax collections of the County Treasurer and obtain all our moneys through that source, we did not make further objection to the jurisdiction. If this Court should reach the conclusion that the City of Cleveland had no place in this action at the very beginning, we trust that it will give consideration to our brief on the basis of our being *amicus curiae*.

The cases called to our attention by this Court on the question of jurisdiction are all in substance to the effect that the three Judge Court does not have jurisdiction un-

less both of the following elements are present: (a) an attempt to restrain a state officer from enforcing a duty imposed by the state law, (b) an allegation that the state law contravenes the constitution. So far as the complaint is concerned it alleges both of these facts. The question remains, is the county treasurer or the county auditor, or the Board of County Commissioners state officers or officers performing state functions within the meaning of Section 266 of the General Code.

Under the laws of Ohio the Board of County Commissioners is the tax levying authority for general taxes not only for the county but for the municipal corporations therein; the City of Cleveland has power to make levies for special assessments, all of which levies are collected by the treasurer of Cuyahoga County and the duty of assessing taxes is upon the County Auditor. In addition to collecting taxes for the county and political subdivisions therein, the county treasurer collects a variety of taxes for the State of Ohio. The county commissioners make levy of taxes to produce money which is used for the maintenance of many state functions. The county auditor makes assessments which are designed to raise money that go to the State of Ohio. This situation we believe brings these county officials at least within the purview of one of the cases which this Court has called to our attention, to-wit, *Spielman Motor Sales Co., Inc., v. Dodge*, 295 U. S. 89, wherein this Court pointed out in the first syllabus:

> "1. District attorneys in New York, though classed by statute as local officers, are part of the judicial system of the State, and, in enforcing state laws of general application by criminal prosecution, perform a state function within their respective counties and are officers of the State within the meaning of Section 266, Jud. Code, p. 92."

We contend the various county officials named as defendants in the original complaint stand in a similar re-

lation to the State of Ohio as the District Attorney of New York does to the State of New York and in support of this we enumerate activities of these officials and functions exercised by them in the interest of the State of Ohio and, which make them a part of the tax levying and collecting system of the State of Ohio.

(A) Under Section 5625-1 of the General Code of Ohio the county commissioners are designated as the taxing authority in the case of the county and under Section 5625-3 of the General Code they are authorized to levy taxes annually on the real and personal property within the county for the purpose of paying the operating expenses of the subdivision and all such taxes levied are extended on the tax duplicate by the county auditor of the county. Out of these taxes are paid the expense of maintaining the county judicial system including the greater part of the salaries of the judges of the common pleas court and the courts of appeals (See General Code Sections 5637, 2251, 2252, 2252-2 and 2253-2), and the salary and expense of the clerk of courts (General Code Sections 2981 and 2993), our Jury Commission and our County Probation Department. The Court of Common Pleas is our state trial court of original jurisdiction and in this court are tried the felony cases in which the State of Ohio is the plaintiff. These judges may be sent by the Chief Justice of our Supreme Court to preside in other counties than in Cuyahoga. In many instances a Court of Appeals has jurisdiction over more than one county. The clerk of the courts not only keeps the records of the court but also has the duty of receiving and filing certificates of title for automobiles under a state-wide law for the registration of automobiles. (See General Code No. 6290-5.) The last paragraph of Section 6290-5 requires that the clerk of courts in the administration of the certificate of title law shall forward all taxes to the treasurer of the state and furnish such information to the tax commission as it may require.

(B) Out of the same taxes levied by the county commissioners are paid the costs of maintaining the office of the prosecuting attorney of the county whose duties require him to inquire into and prosecute crimes within the county and to prosecute the same on behalf of the state, together with complaints, suits, controversies in which the state is a party. (See General Code Sections 2914, 2915, 2916, 3003, 3004 and 3004-1.).

(C) Likewise the same taxes support the office of the sheriff including the maintenance and support of prisoners in the county jail. These taxes go to paying the expense of maintaining the Board of Elections which controls matters relating to the state and even national elections in the respective counties of the state.

The county treasurer has the duty not only of collecting these taxes but is also the tax collecting agent for taxes which are solely for the benefit of the state.

(D) Under the statutes of Ohio relating to public revenues and funds Section 2288 of the General Code designates the office of the nearest county treasurer as a depository for officers who are collecting state moneys; liquor taxes, intangible taxes on personal property that go first to the state, and state inheritance taxes of which the state of Ohio gets one-half, these are all paid into or collected by the county treasurer. The county auditor by various statutes is required to keep account of the funds belonging to the state that are in the county treasury and report thereon. For example see Section 2568 of the General Code of Ohio requiring a current account between the county auditor and the county treasurer.

(E) The State of Ohio has an inheritance tax and it will be noted by our General Code Section 5348-11 that after distributing one-half to certain subdivisions the remainder of the tax after deducting costs and fees, is for the use of the State of Ohio and is paid into the state treasury to the credit of the general revenue fund. This tax is collected

by the county treasurer. (See General Code Section 5338.)

(F) Under our intangible tax law the county auditor compiles a duplicate of all the real and personal utility property in the county. (General Code Section 2583.)

Under Section 2584 in the General Code it is required the county auditor compile a general tax list and a general duplicate of personal property.

Under Section 2600 the auditor is required to send copies of settlements with the treasurer to the auditor of state.

Under Section 2608 the county auditor is required to prepare an abstract of delinquent taxes and send the same to the auditor of the State.

(G) In the State of Ohio we have a State Bureau of Inspection and Supervision of Public Offices within the Department of the Auditor of State which audits and inspects and reports to the state on the books and accounts of various political subdivisions, state institutions and money collecting officials. The expense of this state department under Section 2740 of the General Code is paid by the taxing district such as the county and the money for payment of this expense is withheld from the real estate taxes collected in the county. Section 287 relating to the same subject provides for the auditor of state drawing upon the treasury of various counties to make up a proportion of the expense of the auditing bureau.

(H) Section 1465-65 requires the fiscal officer of each taxing district to file a report showing the money expended by the district for workmen's compensation during the calendar year.

Section 1465-66 requires each county auditor to file a receipt of the report just mentioned to issue his warrant in favor of the treasurer of the State of Ohio on the county treasurer of the county, for the aggregate amount due from such county and the taxing districts therein, to the public insurance fund, and the county treasurer

is required to pay the amount called for by such warrant from the county treasurer.

(I) From the taxes levied by the county commissioners and collected by the county treasurer, a part of the salaries of the municipal judges of Cleveland are withheld and paid on behalf of the state by the county auditor. The county is authorized and instructed to pay part of these salaries under Section 1579-3 of the General Code and this disbursement is on the theory that the municipal court in its jurisdiction as a magistrate to hold preliminary hearings on felonies and its jurisdiction to hear misdemeanor cases which are violations of the state law are performed in part as a state function. Likewise part of the salaries of the prosecutors of the municipal court are paid from these taxes levied by the county commissioners and collected by the county treasurer and payment is made on the same theory as mentioned for the municipal judges.

These various activities seem to indicate rather definitely that the county officers named herein are state officers in the sense that they perform functions for the state of Ohio, collect and pay over taxes that inure to the benefit of the entire State of Ohio and the treasurer is duly designated as a depository for collectors of state funds.

We contend that the county auditor and county treasurer perform state functions as much as the agents of the tax commission of the State of South Carolina in the case of *Query v. United States* in 316 U. S. 486 and is in the same status as the prosecuting attorney is found to be in the *Spielman* case, 295 U. S. 89.

If this Court after hearing the arguments in this case is of the opinion that the county officials named in this case are not state officers within the meaning of Section 266 and that this Court is without jurisdiction, then we request the Court to consider a motion *sua sponte* and dismiss the appeal with instructions that the case be remanded to the

district court, the decree of that court vacated and for further proceedings to be taken independently of Section 266 on authority of *Rorick vs. Board of Commissioners of Everglades Drainage District*, 307 U. S. 208, or reverse the decree and remand the cause for further proceedings independent of Section 266 as was done in the case of *Gulley vs. Interstate Natural Gas Company*, 292 U. S. 816.

ARGUMENT.

In the State of Ohio all property of the United States government is exempt from taxation if it is used for a public purpose. (See General Code Section 5351.)

The Supreme Court of the State of Ohio has held that our own state housing projects are subject to taxation because the act of providing housing is not considered a public purpose. (See *Columbus Metropolitan Housing Authority vs. Thatcher, et al.*, 140 O. S. 38.) After the decision in that case, cases involving the federal housing authority have been taken to that court. On April 26, 1944 in the case of *Federal Public Housing Authority vs. Guckenberger, Auditor*, 143 O. S. 251, it was held that property owned by an instrumentality of the United States is not *ipso facto* immune from taxation; that the business of operating a group of residential buildings, heating plant, containing offices and retail store rooms, was not exclusively a public use and the property was being used in a proprietary capacity. Likewise, in the case of *Youngstown Metropolitan Housing Authority vs. Evatt, Tax Commissioner*, decided May 1, 1944 and reported in 143 O. S. 268, it was again held that the operation of housing units by a governmental body was not an exclusive public purpose and was subject to taxation. In the trial of the case at bar the government contends that our federal authority has no proprietary powers. We agree with the bald statement. The proprietary powers as we understand them under our laws are special powers sometimes given to a political body to operate a certain

type of business, particularly utilities, for the use of inhabitants and to operate them as if they were an ordinary private corporation under our laws in Ohio. Such powers are specifically given to municipalities to operate light plants or transportation systems, but in all such operations they are deemed to stand in the same position as a private corporation and have like powers and like liabilities. (One of the leading cases is *Travelers Insurance Company vs. Village of Wadsworth*, 109 O. S. 440.) Such proprietary powers can only be exercised by states when specifically granted by state law or state constitutions and cities are not permitted to go into any business they see fit under their proprietary powers as for instance the City of Cleveland which owns a large underground garage in connection with its Public Hall and when it attempted to rent the garage to the general public during periods when there were no exhibitions at the Public Hall a suit was brought to restrain the city from entering into this sort of private enterprise on the grounds that it was not authorized by law. The court granted the injunction and our Supreme Court held that such action by the City of Cleveland was an undue interference with the constitutional right of private business. (*City of Cleveland vs. Ruppel*, 130 O. S. 465.) When plaintiffs say that the government has no proprietary powers but at the same time contend for the right of the government to enter into private enterprise such as running apartment buildings and entering into the relationship of landlord and tenant with the general public, they are merely contending that since the government has no proprietary powers, therefore when they act in a proprietary capacity we will have to call it a governmental power.

The rights of the United States government are specifically delegated to it by the constitution of the United States and the tenth amendment to our constitution specifically provides that:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively or to the people."

We are mindful of the various federal activities that have been approved as legitimate within the general welfare clause of the constitution, but we feel that it's stretching that clause too far to say that it authorizes the government to go into the business of building or operating apartments to rent out to certain classes of persons or to the public generally.

We are also mindful of the numerous decisions of this Court particularly the *Van Brocklin* case (117 U. S. 151), which makes the point that property of the United States government is not taxable. The *Van Brocklin* case, or *McCulloch vs. Maryland* (1819) are relied upon and referred to in nearly all decisions on this point. The *McCulloch* case was decided rather early in the history of this Court and we believe at a time when no person contemplated that the government of the United States would engage in the housing business, but even in the *Van Brocklin* case they took the precaution to point out that the government could not hold property for any private purpose that it saw fit and we find in 117 U. S. at the bottom of page 158, in the body of the Opinion the following statement:

> "The United States do not and cannot hold property, as a monarch may, for private or personal purposes. All the property and revenues of the United States must be held and applied, as all taxes, duties, imposts and excises must be laid and collected, 'to pay the debts and provide for the common defence and general welfare of the United States.'" (Constitution, Art. I, Sec. 8, cl. 1.)

We believe it is time that the subject be reviewed and that this Court should again scrutinize this problem, particularly in view of the fact that such a great amount of property, formerly privately owned, is now held by the

United States government. It does not seem just and equitable that the government should assemble great numbers of families in large apartments in the city where they have the benefit of fire and police protection, public health services, water systems, electric lighting of the streets, school facilities and numerous other expensive conveniences that are found in a large city without paying its proportionate share of the cost of these services. And this is pointed out in what we believe to be excellent language in the body of the opinion of our Ohio Supreme Court in the case of *Youngstown Metropolitan Housing Authority vs. Evatt, Tax Commissioner*, 143 O. S. 268, under which decision at page 273 the court said:

> "The cornerstone of a democracy is that he who enjoys the privileges, benefits and protection thereof should bear his proportionate share of the expense, therefore funds produced by taxation are the very lifeblood of government, without which it soon would become impotent. That consideration forms the background for the rule that he who seeks exemption of property from taxation must show by clear and convincing proof his right thereto. In all doubtful cases exemption is denied."

In the City of Cleveland its various suburbs are now being confronted with taxpayer suits in which taxpayers seek to enjoin public officials from rendering public services to the inhabitants of these federal projects and seeking to prevent entrance of the children residing in these projects to our public schools for the reason that they or their landlord, the United States government, is not paying any part of the expense or upkeep. We feel that under no sense of justice should the other citizens of the State of Ohio be required to pay the expense of the upkeep of the schools and pay taxes on real estate to maintain other public services which inure to the benefit of thousands of people who do not contribute to real estate taxes either directly or through their landlord.

THE OWNERSHIP OF REAL ESTATE BY THE FEDERAL GOVERNMENT FOR THE PURPOSE OF OPERATING APARTMENT HOUSES IS NOT THE EXERCISE OF A SOVEREIGN POWER.

We note the trend of the decisions of the United States Supreme Court to be to the effect that no real estate belonging to the United States government is taxable by a state. This proposition must naturally be based upon the theory that taxation of Federal property by a state is inconsistent with sovereignty. The United States government obtains all its sovereign powers from the constitution and we believe that the powers delegated are those necessary for governmental purposes. That by the tenth amendment of the constitution all other powers not delegated or not prohibited are reserved to the states and the people. We are perhaps a little bit old fashioned in our view that Article I, Section 8 relating to general welfare does not confer any additional powers on the federal government and that the words "provided for the general welfare" merely state a purpose for which Congress may lay and collect taxes, etc. We are mindful of the case of *United States vs. Butler*, 297 U. S. 1, but we feel that this case like the cases following *Van Brocklin v. Tennessee* deserve further consideration by this Court. And on this basis we say that the federal government is not acting as a sovereign in owning and operating housing projects such as those established under the National Recovery Act. This point was quite thoroughly argued in the companion appeal in the case of *Boyle vs. United States of America*, No. 69, October Term 1944, and we respectfully refer the Court to the arguments set forth in the appellant's brief in that case on this point. The Court has also suggested to us the question as to whether or not the land in controversy would be taxable even if the Federal Housing Act of 1937 were unconstitutional. We must admit that under some of the older decisions by this Court the constitutionality of the act would not affect the right to tax, but again it is our contention

that lands of the federal government acquired and held not in its sovereign power should be taxable. We do contend however that the housing act is unconstitutional and particularly as to provisions therein exempting the housing projects from taxation. (42 U. S. C. A. 1405 (e).)

CONCLUSION.

The questions relating to the construction of the general welfare clause and the questions relating to the right of power to tax have been so thoroughly discussed in other briefs filed in this case that we have not burdened the Court in further discussing them at length. The case of *McCulloch vs. State of Maryland* which is one of the original cases on the right to tax government property was decided in the year 1819, but even after that there was always doubt among the early legislators and United States attorneys about the right of a state to tax property of the United States. This is pointed out by a rather lengthy discussion in the case of *Van Brocklin vs. Tennessee* (117 U. S.) beginning on page 162 which begins with the year 1804 pointing out that the act establishing the territorial government after the Louisiana purchase indicated that they thought it necessary to provide that the legislative council of the territory should have no power to tax the lands of the United States. One of the conditions of the Act of 1811 and 1812 under which the state of Louisiana was admitted to the Union was that the people agree that lands of the United States remain exempt from any tax laid by order or under the authority of the state. Similar provisions are found with reference to the admission of Mississippi in 1817; Alabama in 1819; Missouri in 1820; Arkansas in 1836; Michigan in 1837; Iowa in 1845; Wisconsin in 1847; Minnesota in 1857 and Oregan in 1859. Florida was admitted in 1845 upon the express condition that it would not levy any tax on public lands of the United States. Likewise California in 1850. It thus distinctly

appears that there was doubt in the early days and notwithstanding decisions of this Court such as *United States vs. Butler*, 297 U. S. 1 and *Helvering vs. Davis*, 301 U. S. 619, there still appears to be a difference of opinion, as is evidenced by these cases that are now before the Court and as is further evidenced by decisions of the Supreme Court of the State of Ohio which we have heretofore cited. So we urge that this proposition be carefully reconsidered by this Court, particularly the interpretation of the general welfare clause in the *Butler* case.

And finally in conclusion we say that the matter of looking after the welfare of citizens so far as providing them with housing, if it is a public matter, it is within the dominion of the powers of the respective states and not the United States government.

Respectfully submitted,

THOMAS A. BURKE, JR.,
Director of Law,

JOSEPH F. SMITH,
Assistant Director of Law,
of Counsel,

Attorneys for Appellant, City of Cleveland,
204 City Hall,
Cleveland, Ohio.